



February 13, 2002

**Development of a New Rule to Establish Wetland Water Quality Standards
and a New Article to Establish Procedures and Criteria for Review of Projects
Requiring Water Quality Certification Under Section 401 of the Clean Water
Act or a State Surface Water Modification Permit
#99-58 (WPCB)**

Overview

The Indiana Department of Environmental Management (IDEM) has developed draft rule language to add a new rule concerning wetland water quality standards to the state water quality standards and a new article to establish procedures and criteria for review of projects requiring water quality certification under Section 401 of the Clean Water Act or a state surface water modification permit. These rules are to be presented to the Water Pollution Control Board on February 13, 2002, for consideration of preliminary adoption.

Citations Affected

This rulemaking adds new rule 327 IAC 2-1.8 and new article 327 IAC 17.

Affected Persons

This rulemaking will affect persons planning activities that require a water quality certification under Section 401 of the federal Clean Water Act including those regulated by the U.S. Corps of Engineers under Section 404 of the Clean Water Act and by the Federal Energy Regulatory Commission. These affected persons along with those affected by requirements for a state surface water modification permit have long been required under the Clean Water Act to meet state standards concerning activities affecting wetlands. The Supreme Court decision of January 2001 in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* left some potential that wetlands determined to be "isolated wetlands" may be removed from federal jurisdiction; however, in Indiana, these areas are determined to be waters of the state. For that

reason, areas determined to be isolated wetlands, if no longer regulated under Section 404 of the Clean Water Act, are to be regulated under the newly developed state surface water modification permit program.

Reason(s) for the Rule

Indiana is required by federal law to establish water quality standards for all waters of the state including wetlands. The state is also required to review projects that include activities requiring a Section 401 water quality certification. To date, this program has been implemented using IDEM's general statutory authority and the water quality standards rules (327 IAC 2). These new rules will provide the state with specific wetland water quality standards and procedures and criteria to be used by IDEM's Office of Water Quality when reviewing applications for Section 401 water quality certification under the federal Clean Water Act. In order to issue a water quality certification, the state is required to review the proposed activity and determine whether the activity will meet certain federal and state requirements including state water quality standards. The water quality certification must contain conditions necessary to ensure compliance with applicable laws and regulations. Those wetland areas determined to be isolated wetlands and removed from federal jurisdiction will be protected through the surface water modification permit program which follows the requirements established for review of Section 401 water quality certifications.

Economic Impact of the Rule

The requirements of these rules follow the current procedures used by the IDEM Office of Water

Quality in reviewing applications for a Section 401 water quality certification and will cause little additional economic impact.

Benefits of the Rule

The impetus for this rulemaking came from the regulated community seeking to have established in Indiana Administrative Code the state's requirements for review of activities conducted in wetland areas. These rules will be a part of the state water quality standards and implementing regulations. These rules will contain water quality standards more appropriate and specific to wetlands than those contained in the current rules. The implementation rules for water quality certification and surface water modification permitting will clarify what is required of an applicant and what procedures the department will utilize to review applications. This should result in more consistent application review by department staff and an expedited review process.

Description of the Rulemaking Project

This rulemaking was initiated with a first notice published April 1, 1999, in the *Indiana Register*. Since that date, extensive outreach has been ongoing with stakeholders from a variety of backgrounds, including the regulated community, citizen groups, and other state agencies, invited to participate in work group meetings. The meetings were open for inclusive public involvement. This rulemaking has been the subject of exhaustive effort by IDEM and other entities through the processes of numerous public workgroup meetings, multiple IDEM seminars taken to various locales throughout the state, the two month long public hearing before the WPCB (board) in 2000, and the half year long process of special hearings by the state's Environmental Quality Service Council in addition to two (2) second notice comment periods occurring December 1, 1999 to February 14, 2000 and October 1, 2001 to October 30, 2001. Voluminous comments, both written and oral, received during the comment periods and the lengthy board hearing have been answered by IDEM. Many rule requirement changes and rule language clarifications have resulted from the comment and response process. The Supreme Court decision of January 2001 in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* occurred at a time when IDEM was prepared to present the wetland draft rules to the board for consideration of preliminary adoption. That adoption was delayed in order to convene a wetland focus workgroup which

met in several lengthy meetings to consider the state surface water modification permit program developed in response to the court ruling.

Scheduled Hearings

First Public Hearing: June 14, 2000 and continuing on July 12, 2000, at the WPCB meetings held at the Indiana Government Building South. The board listened to comments from the public but did not vote on the draft rule.

Second Public Hearing: February 13, 2002, scheduled to consider preliminary adoption at the WPCB meeting held at the Indiana Government Building South

Consideration of Factors Outlined in Indiana Code 13-14-8-4

Indiana Code 13-14-8-4 requires that in adopting rules and establishing standards, the board shall take into account the following:

- 1) All existing physical conditions and the character of the area affected.
- 2) Past, present, and probable future uses of the area, including the character of the uses of surrounding areas.
- 3) Zoning classifications.
- 4) The nature of the existing air quality or existing water quality, as appropriate.
- 5) Technical feasibility, including the quality conditions that could be reasonably be achieved through coordinated control of all factors affecting the quality.
- 6) Economic reasonableness of measuring or reducing any particular type of pollution.
- 7) The right of all persons to an environment sufficiently uncontaminated as not to be injurious to:
 - (A) human, plant animal, or aquatic life; or
 - (B) the reasonable enjoyment of life and property.

Rulemaking Process

The first step in the rulemaking process is a first notice published in the *Indiana Register*. This includes a discussion of issues and opens a first comment period. The second notice is then published which contains the comments and the department's responses from the first comment period, a notice of first meeting/hearing, and the draft rule. The Water Pollution Control Board holds the first meeting/hearing and public comments are heard. The proposed rule is published in the *Indiana Register* after preliminary adoption along with a notice of meeting/hearing. If the proposed rule is substantively different from the draft rule, a third comment period is required. The public meeting/hearing to consider

final adoption is held and public comments are heard. Once final adoption occurs, the rule becomes effective thirty (30) days after filing with the Secretary of State.

IDEM Contact

Additional information regarding this rulemaking

action can be obtained from MaryAnn Stevens, Rules Section, Office of Water Quality, (317) 232-8635, Andrew Pelloso, Water Quality Section, Office of Water Quality, (317) 233-2481, or (800) 451-6027 (in Indiana).